No. 88-90

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHABAD,

and *Petitioner,*

COUNTY OF ALLEGHENY and CITY OF PITTSBURGH,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER CHABAD'S REPLY BRIEF

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One critical proposition appears to be undisputed in the briefs of all respondents and their *amici*: If the nativity scene in the Allegheny County Court House is constitutional, it follows, *a fortiori*, that the menorah on the steps of Pittsburgh's City-County Building is constitutional. *See* American Jewish Committee Brief, p. 15 n.8. Indeed, one *amicus* brief even agrees with our argument that if a creche is displayed, a menorah may

be constitutionally required. *See* American Jewish Congress Brief, p. 27 n.48.

The disputed legal issues, therefore, are only (a) whether both the creche and the menorah must be removed, and (b) whether the menorah may be retained even if the creche is held to be unconstitutional. In this Reply Brief, we respond first to the arguments that relate to both creche and menorah and then to those that relate only to the menorah.

A. The Creche and the Menorah

(1) *The "Seat of Government" Metaphor*—Confronted with *Lynch v. Donnelly*, 465 U.S. 668 (1984), the respondents emphasize a distinction in this case that makes no difference in the real world and that was not perceived by the majority in *Lynch* to make any difference. The nativity scene in *Lynch*, they say, was on privately owned land, whereas the creche and the menorah displayed in Pittsburgh are both at the "seat of government."

These words are invoked primarily for their rhetorical effect. They suggest that the location of these symbols is akin to a throne—that they give the displays the impact of a royal decree. There is, however, no meaningful difference, to the understanding of the ordinary citizen, between the park in the heart of Pawtucket's shopping district, which was the site of the display in *Lynch*, and the front steps of Pittsburgh's City-County Building, where the menorah in this case was erected. Ordinary citizens are not familiar with the details of land-title records. A display at either location conveys official respect for religion, but neither carries a message of official coercion.

(2) *The Proliferation of Litigation*—The American Jewish Congress curiously implies that *Lynch v. Donnelly*, 465 U.S. 668 (1984), is a bad decision because there have been more reported cases involving seasonal

religious displays since *Lynch* was decided than there were before 1984. American Jewish Congress Brief, pp. 4-5 & nn.2, 3. By this standard, *Roe v. Wade*, 410 U.S. 113 (1973), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Baker v. Carr*, 369 U.S. 186 (1962), would have to be classified as unsound. Each of these landmark rulings was followed by much litigation.

In fact, until national groups such as the ACLU recently began a multi-state drive to challenge nativity scenes (and they, along with some national Jewish organizations, determined to prove their even-handedness by seeking to remove menorahs), all segments of American society willingly accepted the varied forms of public acknowledgement of religion that appear during the winter holiday season. Few Americans saw Christmas trees, creches, or menorahs as a threat to their own conscientious convictions. As Judge Weis said in dissent in the court below, the challenge to these displays has been "much ado about nothing." The proliferation of litigation is the fault of those who rush to court to eradicate seasonal displays, not the fault of a decision that told them their approach is constitutionally unsound.

B. The Menorah Alone

(1) *The Character of the Menorah*—Our brief is replete with acknowledgements that the menorah is a Jewish symbol and that it has religious significance (*e.g.*, pp. 2, 4-5, 6, 7, 17, 19, 23, 24-26, 30). Respondents and their *amici* persist, nonetheless, in mischaracterizing our argument in order to weaken it. They assert that we maintain that the menorah "is not a religious symbol" (ACLU Brief, p. 19; American Jewish Committee Brief, p. 14; Tunador Brief, p. 17). We have not said that. What we have said and continue to say is that the menorah is not an *exclusively* religious symbol. It conveys various messages in addition to its religious message. *See* pp. 24-26 of our brief. In this respect,

the menorah differs from the nativity scene or the crucifix, both of which convey essentially religious messages. And there was ample testimony from which the district court could reasonably have concluded that the display of the menorah conveyed the universal messages of liberty and freedom that were explained in the accompanying 18-by-4-foot sign.

(2) *The Motives of Chabad*—Some of the opposing briefs seek to belittle Chabad, primarily by minimizing its support within the Jewish community (ACLU Brief, p. 8; American Jewish Committee Brief, p. 14) and branding it "a fundamentalist group" (American Jewish Committee Brief, p. 14, n.9) or "extreme orthodoxy" (ACLU Brief, p. 8). In fact, Chabad has broad support within the American Jewish community from all quarters —Reform, Conservative, and Orthodox branches of Judaism. More fundamentally, however, the nature of Chabad is wholly irrelevant to the constitutional issue. The dispositive legal question is not why Chabad has donated a menorah for use by the City of Pittsburgh. It is, rather, what the *City's* purpose is in displaying the menorah, what the primary effect of that display is, and whether it creates excessive entanglement between church and state.

(3) *The Character of the Christmas Tree*—We do not now and did not in the district court challenge Pittsburgh's display of a Christmas tree although the tree, like the menorah, has both religious and non-religious significance. Can there really be any doubt that a Christmas tree has more meaning for those who religiously observe the Christmas holiday than for non-Christians? The ACLU now cites our failure to present evidence regarding the Christmas tree as a waiver of our constitutional argument that the Jewish faith is legally entitled to equal treatment (ACLU Brief, pp. 28-29). No evidence regarding the Christmas tree was introduced in the trial court because (1) Chabad was denied leave to

intervene at the initial stage of the proceeding in the district court, and (2) because we were not seeking, as one respondent (ACLU Brief, p. 30) and an *amicus* (American Jewish Congress Brief, p. 26 n.47) are now proposing, removal of the tree. Our contention is that if the Christmas tree has *some* religious significance to Christians, a symbol like the menorah, that has *some* religious significance to Jews, is entitled to equal treatment.

(4) *Other Faiths*—The final argument made against us is the last refuge of desperate constitutional litigators. They prophesy that a flood will follow an adverse decision. If the menorah is permitted, how many of the nation's 1,347 religious organizations (ACLU Brief, p. 30) will be clamoring to display a holiday symbol on the steps of Pittsburgh's City-County Building? The ACLU notes correctly that there is no evidence in the record as to whether any other religious denomination asked to be represented there by a holiday symbol (ACLU Brief, p. 29). But that is an argument for sustaining the constitutionality of the menorah display, not for removing the menorah on the basis of speculation and surmise. If Pittsburgh ever becomes inundated with such requests, it may deal with that problem when it arises. And if it then chooses to deny a place to a Jewish symbol because there is no room on the steps of a public building for all who seek a place, the constitutionality of that decision can be determined on that particular record.

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted,

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